Supreme Court, U.S.
FILED
FEB 24 2011
OFFICE OF THE CLERK

No. 10-638

IN THE

Supreme Court of the United States

NANCY J. WETHERILL,
Petitioner,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SARAH E. BARON HOUY
MICHAEL M. HICKEY
BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.
333 West Blvd., Ste. 400
P.O. Box. 2670
Rapid City, SD 57709
(605) 343-1040

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
RAY D. MCKENZIE
MARQUES P. RICHESON
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
cliff.sloan@probonolaw.com

Table of Contents

Page

I. Respondents Do Not Dispute That The Courts Of Appeals Disagree Whether 10 U.S.C. § 10216(a) Bars Application Of The *Feres* Doctrine Or That This Case Is An Appropriate Vehicle To Resolve The Split 2

A. The Split Over § 10216 Is Real 3

B. The Circuits Are Not Likely To Resolve The Split On Their Own 4

C. Respondents' Merits Arguments Are Wrong And Simply Highlight The Need For Review 6

II. The Court Should Resolve The Outcome-Determinative Disagreement Among Lower Courts Over When Claims By Dual-Status Technicians Are Barred By *Feres* 8

A. The Split Is Outcome-Determinative 9

B. This Case Is A Proper Vehicle To Resolve The Split 11

Conclusion 13

Table of Authorities

Cases

Afroyim v. Rusk,
387 U.S. 253 (1967) 12

Brown v. United States,
227 F.3d 295 (5th Cir. 2000) 4

Filer v. Donley,
No. 4:10-CV-310-A, 2011 WL 196169 (N.D. Tex. Jan. 20, 2011) 9, 11

Feres v. United States
340 U.S. 135 (1950) 1

Hunter v. Stetson,
444 F. Supp. 238 (E.D.N.Y. 1977) 10, 11

Jentoft v. United States,
450 F.3d 1342 (Fed. Cir. 2006) 2, 3, 4, 5, 6, 7

Laurent v. Geren,
Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008) 11

Newport v. Fact Concerts,
453 U.S. 247 (1981) 10

Olden v. LaFarge Corp.,
383 F.3d 495 (6th Cir. 2004) 8

Republic of Iraq v. Beaty,
129 S. Ct. 2183 (2009) 7, 8

Thompson v. McHugh,
388 F. App'x 870 (11th Cir. 2010) 6

United States v. Gonzales,
520 U.S. 1 (1997) 5

Statutes

10 U.S.C. § 10216(a) 1, 2, 7

29 U.S.C. § 206 2

42 U.S.C. § 2000e-16(a) 4, 6

Miscellaneous

H.R. Rep. 105-132, 358 (1997) 8

Eugene Gressman et al.,
Supreme Court Practice (9th ed. 2007) 10

Respondents acknowledge that the lower courts have split in two different ways over the question whether dual-status technicians in the National Guard can bring discrimination claims under *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. First, the courts of appeals disagree whether the plain language of 10 U.S.C. § 10216(a) permits such suits by expressly defining dual-status technicians as "Federal civilian employee[s]" for "any . . . provision of law." Second, the courts rejecting such an interpretation disagree over when dual-status technicians may sue.

Respondents nevertheless oppose review. They argue that the first split is illusory because the courts of appeals have applied their conflicting readings of § 10216 to different statutes and that, in any event, the split will resolve itself. But neither argument is persuasive. The split is real – as the courts of appeals have themselves repeatedly stated. And it will continue to fester absent this Court's intervention; indeed, the split began with an express acknowledgment by the Federal Circuit that other circuits had reached contrary conclusions.

Respondents argue that the second split has not proven outcome-determinative and that this case is a poor vehicle for review. But these arguments likewise fail. Outside the Eighth Circuit, courts have allowed claims much like petitioner's here to proceed under *Feres* – a fact that refutes both of respondents' contentions. Accordingly, this Court should grant review to resolve the fractured approaches of the courts of appeals on this issue of recurring importance.

I. Respondents Do Not Dispute That The Courts Of Appeals Disagree Whether 10 U.S.C. § 10216(a) Bars Application Of The *Feres* Doctrine Or That This Case Is An Appropriate Vehicle To Resolve The Split.

Respondents agree: the courts of appeals have reached opposite conclusions regarding whether the *Feres* doctrine should apply to discrimination claims brought by dual-status technicians – a group that Congress has classified as "Federal civilian employees" for purposes of "any . . . provision of law" in 10 U.S.C. § 10216(a)(1). See Br. For Fed. Resp'ts In Opp'n ("BIO"), 10 (recognizing that the Federal Circuit held in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), that *Feres* does not apply to dual-status technicians in light of the statute); *id.*, 14 (citing decisions of the Second, Fifth, Sixth, Eighth and Ninth Circuits rejecting this approach). And respondents do not dispute that this case presents an appropriate vehicle to clarify the meaning of § 10216.

Instead, respondents oppose certiorari on other grounds: (1) no real conflict exists because the Federal Circuit applied its construction of § 10216 to a claim arising under the Equal Pay Act, 29 U.S.C. § 206 ("EPA"), rather than Title VII; (2) the Federal Circuit will reverse its position once it considers the legislative history of § 10216; and (3) the Federal Circuit is wrong on the merits. Respondents are wrong: the split is real, it is unlikely to resolve on its own, and the parties' debate over the merits simply highlights the need for this Court's review.

A. The Split Over § 10216 Is Real.

Respondents maintain that the courts of appeals are not really divided; that, although the courts have disagreed over the interpretation of § 10216(a), they have done so in different contexts: "the Federal Circuit relied on 'the plain language of the Equal Pay Act,' which defines a covered employee to include 'any individual employed by the Government of the United States . . . as a civilian in the military departments,'" while other courts have applied § 10216(a) in the context of Title VII, which "contains no such language." BIO, 17-18. This argument is wrong for several reasons.

First, the courts of appeals themselves believe they are in conflict. Indeed, in *Jentoft* the Federal Circuit *expressly* disagreed with the decisions of other courts of appeals in *Title VII* cases brought by dual-status technicians. It acknowledged that the First, Fifth, and Sixth Circuits had dismissed claims brought by dual-status technicians "under other similar discrimination statutes," including Title VII. See 450 F.3d at 1349. It did not try to reconcile its reasoning with those decisions; it disagreed with them. See *id.* Thus, *Jentoft* was not based on the EPA's language, as respondents here suggest; rather, it was expressly based on "the plain language of § 10216(a)." *Id.* Most of the other courts of appeals likewise believe the split is real. See, *e.g.*, Pet. App. A, 12a ("[T]wo of our sister circuits have considered and rejected the reasoning of *Jentoft*.").

Second, respondents' argument fails as a matter of logic. Its premise – that the EPA and Title VII have meaningfully different language – is flawed. True, the EPA covers "'any individual employed . . . as a

civilian in the military departments,'" as respondents point out. BIO. 17 (quoting *Jentoft*, 450 F.3d at 1348). Title VII similarly covers "[a]ll personnel actions affecting employees . . . in military departments." 42 U.S.C. § 2000e-16(a). If anything, this language is broader than the EPA, as it is not expressly limited to "*civilian[s]* in the military departments." However, the courts have read this same limitation into Title VII. *E.g.*, *Brown v. United States*, 227 F.3d 295, 298 (5th Cir. 2000) ("[T]his waiver has been understood to apply only to suits by civilian employees of the military departments . . . ."). The statutes are thus identical in scope, and because – as respondents argue – "Congress is presumed to be familiar with established case law" when it acts, BIO. 15, its enactment of § 10216 must be understood to have an identical effect on suits under both the EPA and Title VII. Most courts of appeals thus have felt it necessary to reject rather than distinguish *Jentoft* in deciding whether § 10216 authorizes suit by dual-status technicians.

Accordingly, respondents' attempt to distinguish *Jentoft* is rejected by both precedent and logic, and presents no reason to deny review.

B. The Circuits Are Not Likely To Resolve The Split On Their Own.

Respondents alternatively argue that this Court should tolerate the "tension" among the circuits because the Federal Circuit may repudiate its five-year-old decision in *Jentoft*. BIO. 18. They claim the Federal Circuit failed to "consider the legislative history of the 1997 amendments" to § 10216(a) and lacked "the benefit of the analysis" of the other courts of ap-

peals that subsequently disagreed with *Jentoft*. *Id.* This speculation is unpersuasive.

Indeed, the Federal Circuit already considered (and rejected) a legislative-history argument substantially similar to the one presented here. The government argued in *Jentoft* that the "legislative history of the Technician Act" supported its view that "intended that dual status technicians . . . would be subject to the same military authority and discipline as other National Guardsmen," see Br. for Def.-Appellee, *Jentoft*, 450 F.3d 1342 (Fed. Cir. Nov. 17, 2005) (No. 05-5125), 2005 WL 3517988, *35-36, though it did not specifically address the history of the 1997 amendment. The Federal Circuit was not persuaded. See 450 F.3d at 1347 (noting the legislative-intent argument). It instead felt bound to follow the "clear direction" from the "broad and unambiguous language" of § 10216(a). *Id.* at 1349. This analysis is unsurprising, as a court faced with a "straightforward statutory command" has "no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Thus, respondents' theory that the Federal Circuit would reverse itself if presented with additional legislative history is wishful thinking.

Respondents also err in contending the Federal Circuit will seek harmony with its sister circuits. Notably, the argument belies respondents' earlier, equally uncompelling argument – that *Jentoft*'s logic is limited to the EPA. Were *Jentoft* so limited, the Title VII decisions of other courts would not have any meaning for the Federal Circuit. But, in any event, the Federal Circuit was expressly "mindful" that it was contradicting the Title VII decisions of "other cir-

cuits" in holding that § 10216(a) allows dual-status technicians to sue notwithstanding *Feres*. 450 F.3d at 1349. And it was just as clear that it was not persuaded by this contrary authority; rather, it felt "enjoined" to apply "the plain language of § 10216(a)" in spite of it. *Id.* Nothing suggests the Federal Circuit would stand any less firm in its convictions today.

Accordingly, only this Court's review will resolve disagreement over the meaning of § 10216(a).

C. Respondents' Merits Arguments Are Wrong And Simply Highlight The Need For Review.

Respondents' main argument is that *Jentoft* was wrongly decided, relying almost exclusively on the decisions of the other courts of appeals. See BIO, 2-5, 14-17 (setting forth legislative history and arguing merits). This is not an argument against granting the petition; just the opposite. Respondents' heavy reliance on court of appeals decisions underscores that there is no definitive guidance from this Court on the question presented. It also shows that the split is mature – the courts of appeals have explored the issues at length and staked out their positions, leaving little to be gained by further percolation.

In any event, respondents' arguments lack merit. They first argue that § 10216 contains no "clear statement" that waives sovereign immunity for Title VII claims. BIO, 13-15. But none is needed; Title VII already expressly waives sovereign immunity for civilians in military departments. See 42 U.S.C. § 2000e-16(a); see, *e.g.*, *Thompson v. McHugh*, 388 F. App'x 870, 872 (11th Cir. 2010) ("Title VII waives sovereign immunity . . . .").

Instead, the question here is whether § 10216(a) defines a dual-status technician as a "civilian." It clearly does. It states that technicians are "Federal civilian employee[s]" for "any . . . provision of law." No broader or clearer statement could be made; indeed, as this Court recently held, "the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning.'" *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) (internal citation omitted); *accord Jentoft*, 450 F.3d at 1349 (applying "broad and unambiguous" language of § 10216(a)).

Respondents resist this analysis, arguing that § 10216(a) is not as clear as it seems because it "'[goes on to] state[] that National Guard technician . . . are 'dual status' employees because they are federal civilian employees *and* members of the reserve forces.'" BIO, 16 (citation omitted). But respondents' attempt to find ambiguity in the statute fails. True, the statute *identifies* dual-status technicians as those employees who, among other things, must "maintain membership in the Selective Reserve." 10 U.S.C. § 10216(a)(1)(B). But it in turn *defines* dual-status technicians to be "Federal *civilian* employee[s]" for "any" provision of law. *Id.* § 10216(a)(1) (emphasis added). And § 10216(a)(2) further clarifies that dual-status technicians "shall be authorized and accounted for as a separate category of *civilian employees*" (emphasis added).

Respondents finally argue that the legislative history of § 10216 shows Congress's only purpose was to clarify "nomenclature." BIO, 17. Not so. The relevant history shows little of Congress's intent one way or the other – it is two sentences long and cites unexplained "inconsistencies" in laws defining "military

technician" as a reason for its enactment. This cursory reference is not elaborated; nor does it suggest that this is the exclusive purpose. H.R. Rep. 105-132, 358 (1997). But even assuming respondents' reading is plausible, resort to legislative history is improper when the statutory language is so clear, as this Court has repeatedly held. See, *e.g.*, *Beaty*, 129 S. Ct. at 2191. The same rule applies to contentions that Congress has "painted with too broad a brush" or that clear language has "unintended consequences." *Olden v. LaFarge Corp.*, 383 F.3d 495, 506 (6th Cir. 2004).

At best, respondents present the other side of these arguments; because the courts of appeals have taken both sides, however, only this Court can definitively resolve the merits.

II. The Court Should Resolve The Outcome-Determinative Disagreement Among Lower Courts Over When Claims By Dual-Status Technicians Are Barred By *Feres*.

Respondents also agree that lower courts disagree on the standard for deciding whether *Feres* bars claims by dual-status technicians. According to respondents, the "vast majority" of courts follow an approach that bars claims that "ar[i]se out of activity incident to military service," BIO, 18, while the Sixth Circuit applies "a categorical bar" to claims by dual-status technicians, *id.* at 19. Nonetheless, respondents resist review on two grounds: (1) the split is not outcome-determinative; and (2) this case is not a proper vehicle for review. Neither argument has merit.

A. The Split Is Outcome-Determinative.

Respondents first err in arguing that there is no "evidence that divergent approaches among the courts of appeals are resulting in divergent outcomes." BIO, 19. Indeed, in a footnote, respondents concede the opposite, acknowledging that "a single district court decision" has "allowed a dual-status technician's Title VII claim to proceed." *Id.* at 19 n.5. Instead, what respondents really appear to be arguing is that the Court should not grant review to resolve a split between one district court and the courts of appeals.

That argument is a red herring, as other courts have similarly allowed Title VII suits by dual-status technicians to proceed. Just recently, the U.S. District Court for the Northern District of Texas held that a hostile-work-environment claim by an air reserve technician could proceed under the Fifth Circuit's "clearly civilian" approach to *Feres*. *Filer v. Donley*, No. 4:10-CV-310-A, 2011 WL 196169, at *1 (N.D. Tex. Jan. 20, 2011); see also Pet., 10 (identifying Fifth Circuit test). The court distinguished other cases holding Title VII claims nonjusticiable, concluding that a "hostile work environment" claim can be "safely adjudicate[d] . . . without having to review military personnel decisions." 2011 WL 196169, *4. *Filer* demonstrates that the Fifth Circuit's test is outcome-determinative – such a claim would necessarily be rejected as barred by *Feres* under the Sixth Circuit's "categorical" approach. And petitioner's retaliation claim could plainly be adjudicated under the Fifth Circuit's approach, since it does not bear on "military personnel decisions."

Moreover, at least one court allowed retaliation claims by a dual-status technician under Title VII – much like the claim presented here. See Pet., 4-5. In *Hunter v. Stetson*, 444 F. Supp. 238, 238-39 (E.D.N.Y. 1977), a dual-status technician alleged that his military rank in the National Guard was reduced in retaliation for his assistance in helping a civilian coworker file a discrimination complaint against the Guard. The district court held that the technician asserted a cognizable claim under Title VII because the "decision-making in the military sphere has allegedly been polluted by retaliatory motive with respect to the civilian sphere" and the "military disciplinary action [] had an impact on his civilian employment." *Id.* at 240.

These cases demonstrate the circuits' disagreement over *Feres* has a decisive impact, and they underscore the need for this Court's review. If respondents mean to argue that review is inappropriate solely because the divergent approaches have not yet produced different outcomes in the courts of appeals, this argument lacks merit. This Court has previously granted review of "novel" and "important" issues that "appear[] likely to recur," even when disagreement is limited to the district courts. See *Newport v. Fact Concerts*, 453 U.S. 247, 257 & n.14 (1981); Eugene Gressman et al., *Supreme Court Practice* § 4.8, 257 (9th ed. 2007). It should do so here as well. The question here is important: it relates to the jurisdiction of the federal courts and the right of individuals to seek a remedy for discriminatory conflict that Congress has unambiguously determined to be unlawful, even in the "military departments." The disagreement is substantial, particularly in light of the other split on

this issue. One court of appeals would always allow dual-status technicians to sue; one would never allow such suits; and others would allow them only under certain circumstances as dictated by competing analytical frameworks.

Accordingly, respondents are wrong that the admitted split is not outcome-determinative.

B. This Case Is A Proper Vehicle To Resolve The Split.

Respondents' alternative argument that petitioner's suit is a poor vehicle because it "would not be cognizable in any circuit," BIO, 19, likewise fails. It overlooks an important part of petitioner's claim: that her supervisor retaliated against her for submitting a formal EEO complaint. As punishment for complaining about discriminatory treatment, petitioner was assigned to perform her duties in a condition akin to solitary confinement in the workplace. See Pet., 4. Even if other aspects of her claims might "not be cognizable in any circuit," the retaliation claim likely would be. One district court has allowed such a claim, *Hunter*, 444 F. Supp. at 240, and two district courts have allowed hostile-work-environment claims that, like petitioner's retaliation claim, could be "safely adjudicate[d] . . . without having to review military personnel decisions." *Filer*, 2011 WL 196169, *4; see *Laurent v. Geren*, Civ. No. 2004-0024, 2008 WL 4587290, at *3 (D.V.I. Oct. 10, 2008).

In addition to the conflicts in the courts of appeals on how and when *Feres* bars discrimination claims by dual-status technicians, petitioner has also noted a more fundamental problem – the applicability of

Feres in this context at all. As to that more basic question, respondents maintain that the courts of appeals are uniform. BIO, 20-21. But this Court has not hesitated to correct a uniformly erroneous interpretation of a matter of recurring importance. See, *e.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 255-56 (1967) (granting certiorari in light of criticism of ten-year-old decision by commentators and dissenting opinions).[1] In any event, the (erroneous) uniformity of the lower courts on the threshold *Feres* question stands in stark contrast to their clear division over the important question of the meaning of § 10216, which is squarely presented in this case.

---

[1] Indeed, respondents offer no defense of discrimination as a tool of military order, except to say that judicial review would threaten the "special relationship" between soldier and superior. BIO, 20-21. But no support is cited, and no response offered to the commentators who have rejected extension of this theory to dual-status technicians. See Pet., 8, 19-21.

CONCLUSION

For the foregoing reasons and for those set forth in the opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

SARAH E. BARON HOUY
MICHAEL M. HICKEY
BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.
333 West Blvd., Ste. 400
P.O. Box. 2670
Rapid City, SD 57709
(605) 343-1040

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
RAY D. MCKENZIE
MARQUES P. RICHESON
1440 New York Ave., NW
Washington, D.C. 20005
(202) 371-7000
cliff.sloan@probonolaw.com

February 24, 2011